

**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

**IN THE MATTER OF APPLICATION TO)
CHANGE A WATER RIGHT NO. 43B)
30002710 BY USA (DEPT. OF)
AGRICULTURE – FOREST SERVICE))**

FINAL ORDER

The proposal for decision in this matter was entered on May 3, 2005. None of the parties filed timely written exceptions or requested an oral argument hearing pursuant to ARM 36.12.229.

Therefore, the Department of Natural Resources and Conservation (Department) hereby adopts and incorporates by reference the Findings of Fact and Conclusions of Law in the Proposal for Decision.

Based on the record in this matter, the Department makes the following order:

ORDER


Application to Change a Water Right No. 43B-30002710 is hereby **DENIED**.

NOTICE

A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under the Montana Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.). A petition for judicial review under this chapter must be filed in the appropriate district court within 30 days after service of the final order. (Mont. Code Ann. § 2-4-702)

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcript prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements for preparation of the written transcript. If no request for a written transcript is made, the Department will transmit only a copy of the audio recording of the oral proceedings to the district court.

Dated this 31st day of May, 2005.



Jack Stults, Administrator
Water Resources Division
Department of Natural Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

FILMED

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of Final Order was served upon all parties listed below on this 1st day of June, 2005 by first class United States mail.

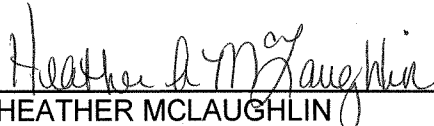
USA (DEPT. OF AGRICULTURE – FOREST SERVICE)
PO BOX 130
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JAMES, INGRID & MICHAEL STATZ
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TIM MCLAUGHLIN
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RONALD SHERTER
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JO AN E WINTERS
PO BOX 774
GARDINER MT 59030-0074


HEATHER MCLAUGHLIN
HEARINGS UNIT
406-444-6615

1 **BEFORE THE DEPARTMENT OF**
2 **NATURAL RESOURCES AND CONSERVATION**
3 **OF THE STATE OF MONTANA**

4 *****

5 **IN THE MATTER OF APPLICATION TO)**
6 **CHANGE A WATER RIGHT NO. 43B)**
7 **30002710 BY USA (DEPT. OF)**
8 **AGRICULTURE – FOREST SERVICE))**

9 **PROPOSAL FOR DECISION**

10 *****

11 Pursuant to the Montana Water Use Act (Title 85, Chapter 2, Mont. Code Ann.)
12 and to the contested case provisions of the Montana Administrative Procedure Act (Title
13 2, Chapter 4, Part 6, Mont. Code Ann.), a hearing was held on December 7, 2004 in
14 Bozeman, Montana to determine whether an authorization to change Water Right Claim
15 No. 43B-020813-00 should be granted to USA (Department of Agriculture – Forest
16 Service), hereinafter referred to as “Applicant” for the above application, under the
17 criteria set forth in Mont. Code Ann. § 85-2-402.

18 **APPEARANCES**

19 Applicant appeared at the hearing by and through counsel, Jody M. Miller.

20 Cheryl L. Taylor, Hydrology Technician, Gallatin National Forest Supervisor’s
21 Office; Ken Britton, Forest Service Ranger, Gardiner Ranger District; Scott Compton,
22 Regional Manager, Bozeman Water Resources Regional Office, Montana Department
23 of Natural Resources and Conservation (Department or DNRC); and David Brunz
24 testified for the Applicant.

25 Objectors Jo An Winters, Tim McLaughlin, and Ingrid and Michael Statz
26 appeared at the hearing in their own behalf.

27 Jo An Winters and Ronald Shorter, Manager, Gardiner Park County Water
District, testified for Objector Winters.

Michael Statz and Scott Compton testified for Objectors Ingrid and Michael Statz.

Tim McLaughlin testified in his own behalf.

Ronald Shorter appeared on behalf of Objector Gardiner Park County Water
District and stated that the District withdrew its objection.

EXHIBITS

Applicant

Applicant offered, and the Hearing Examiner accepted and admitted into evidence the following exhibits:

Exhibit A-1 is an orthophoto labeled "43B30002710", T.9S., R.8 and 9E., Park County, Montana and dated October 15, 2004. Several points corresponding to photographs in Exhibit A-2 are labeled on the orthophoto. Applicant provided an enlarged version of this map for use at the hearing. A digital photograph of the enlarged version of Exhibit A-1 taken by the Hearing Examiner is attached to this proposal for decision (Attachment).

Exhibit A-2 includes several photographs taken October 8, 2004 and a description of each photograph including the following: two photographs of the Donald Creek Ditch (DC1 and DC2); six photographs of the Hayes-McPherson Ditch (HM1 through HM6); and 11 photographs of the Biglow-Chapman Ditch (BC1 through BC11). Objector Michael Statz objected to the admission of this exhibit on the grounds that a headgate was not accurately described. The objection was overruled, the exhibit was admitted, and Objector Statz was advised that he might present his own view of what the photos show, present his own evidence, and question the witness about the photos during cross-examination. The photographs were taken by Cheryl Taylor. (Testimony of Cheryl Taylor)

Exhibit A-3 is entitled "Field Investigation Report," dated September 9, 2004, by Scott Compton, Regional Manager, DNRC. A copy of the complaint being investigated is attached to the report. Other attachments to the report include a table showing Eagle Creek water rights (8-04), and Bear Creek water rights (2-8-04); and a map or photograph entitled "Biglow-Chapman Ditch Field Investigation (9/1/2004) and labeled "Montana DNRC Scott Compton."

Exhibit A-5 includes copies of two agreements for individual voluntary services between David Brunz and the USDA-Forest Service, Gardiner RD. One is dated May 1998. The other is dated July 1999.

Applicant did not offer any other exhibits.

1 **Objector Winters**

2 Objector Winters offered, and the Hearing Examiner accepted and admitted into
3 evidence at the hearing the following exhibits:

4 **Exhibit O-Winters-1-A** is a two-page "Acknowledgement of Water Right
5 Ownership Update" from the Department for Water Right Number 43B-W-120968-00
6 dated 6/22/00.

7 **Exhibit O-Winters-1-B** appears to be a reproduction of a portion of a plat or
8 survey. "SEC 23 T9S R8E" appears in the lower right corner. The place where Bigelow
9 Springs "daylights" hillside has been hand written on the map. During the hearing, the
10 place of use for Objector Winters water right was circled in blue and red.

11 **Exhibit O-Winters-1-C** is a two-page "Abstract of Water Right Claim" dated
12 07/11/00 for Water Right Claim Number 43B-214834-00.

13 **Exhibit O-Winters-1-D** appears to be a photocopy of an undated Water
14 Resources Survey map for a portion of Park County. Objector Winters' point of
15 diversion and place of use were drawn on the map by the Hearing Examiner during the
16 hearing.

17 **Exhibit O-Winters-2-C** is a letter from Ken Britton, District Ranger, Gardiner
18 Ranger District, to Edward and JoAn Winters dated September 8, 2004.

19 **Exhibit O-Winters-2-A** is an unsigned letter dated August 26, 2004 from Edward
20 H. Winters and JoAn E. Winters to U.S. Forest Service and William Hoppe. The
21 Applicant objected to admission of this exhibit because it addresses illegal use of water
22 which is not at issue in this hearing. I admitted only the 3rd full paragraph of the letter,
23 which begins "We have water rights" because it addresses water shortage which may
24 be relevant to adverse effect.

25 **Exhibit O-Winters-2-E** is a copy of a two-page Water Use Complaint form filed
26 by Jo An Winters dated September 10, 2004. Applicant objected to admission of the
27 exhibit on the grounds that it is not relevant. Objector Winters argued that the exhibit
28 shows that "we don't have water." I agreed that it showed that the Objector complained
29 that she didn't have water and admitted the exhibit.

30 **Exhibit O-Winters-3-C** is an EA for this application, which has been modified by
31 Objector Winters. Ms. Winters testified that her modifications to the document are

1 displayed in red, purple, or pink type. I admitted relevant portions of this exhibit as a
2 written summary of Objector Winters' testimony and not as an EA. After the hearing I
3 marked portions of the exhibit that are admitted because they are relevant to the
4 statutory requirements at issue in this hearing. Portions that relate to alleged illegal use
5 of water, land use and management decisions by the Forest Service, water quality, a
6 conservation easement, local plans and goals, water quality, recreation, wilderness and
7 other topics not relevant to the statutory criteria at issue in this case were not admitted.

8 **Exhibit O-Winters-3-C-1** is a letter from JoAn E. Winters dated November 15,
9 2004 re: "Correction to "Exhibit O-Winters 3 "Jo An Winters' Re-written Environmental
10 Assessment.""

11 **Exhibit O-Winters-3-L** is a table entitled "Gardiner Park Country [sic] Water
12 District – Production from the Spring." On the backside of the table is a graph showing
13 Gardiner water production.

14 **Exhibit O-Winters-3-M** is a letter dated July 9, 2003 and a two-page notice of
15 rate increase dated July 28, 2003 and August 4, 2003 from the Gardiner-Park County
16 Water District to Customer. Applicant did not object to the graph entitled "Gardiner
17 Water Production" that was included in the letter but did object to the remainder of the
18 letter on the grounds that it relates to water quality. I admitted the exhibit for
19 consideration of portions relevant to water quantity.

20 **Exhibit O-Winters-3-N** is a cover or title page and page 16 of Hydrogeologic
21 Assessment of Gardiner Public Water Supply for Ground Water Under the Direct
22 Influence of Surface Water, MBMG-Open-file Report 401I, prepared by Alan English
23 and Richard Marvin, Montana Bureau of Mines and Geology (May 2000).

24 **Exhibit O-Winters-3-O** is a two-page list of water rights. The page is truncated
25 on the right side. The source of the list is not identified or known.

26 **Exhibit O-Winters-3-P** is a photocopy of Certificate of Water Right Number
27 77663-S43B dated September 17, 1991.

28 **Exhibit O-Winters-3-Z-3** is a photocopy of a General Abstract for Water Right
29 Claim Number 43B-59770-00 dated September 10, 2003.

30 **Exhibit O-Winters-3-Z-5** is a copy of an affidavit signed by Stephen P. Glasser,
31 Forest Hydrologist, Gallatin National Forest, filed In the Matter of the Adjudication of the

1 Existing Rights to the Use of All the Water, Both Surface and Underground, Within the
2 Yellowstone River Drainage Area, Including All Tributaries of the Yellowstone River
3 Above and Including Bridger Creek in Gallatin, Park, Sweetgrass and Stillwater
4 Counties, Montana, Case 43B-221. The affidavit was signed December 29, 1987.

5 **Exhibit O-Winters-3-Z-7** includes four pages of photographs taken on various
6 dates between 1972 and 2004. The photographs show irrigation ditches, irrigated
7 fields, and streams. The photographer is not identified.

8 **Exhibit O-Winters-3-Z-8** includes four pages of photographs taken on various
9 dates between 1999 and 2004. The photographs show irrigation works, irrigation, and
10 the old Hayes Ranch. The photographer is not identified.

11 **Exhibit O-Winters-3-Z-9** includes two pages of photographs. All photographs
12 except one are undated. The photographs show trees, irrigation works, and the general
13 area affected by the application. The photographer is not identified. After an objection
14 was raised by the Applicant, a photograph of elk and/or deer was removed from the
15 exhibit and not included because it was irrelevant.

16 Objector Winters offered, and then withdrew her offer to admit the following
17 exhibits:

18 **Exhibit O-Winters-O** is a photocopy of an undated and unsigned letter to "USA
19 Dept. of Agriculture-Forest Service" from Jo An Winters requesting discovery and
20 disclosure. A certificate of mailing appears at the bottom of the photocopy. After I
21 questioned Objector Winters about the relevance of the exhibit, I interpreted Objector
22 Winters' statement "throw it out" as a withdrawal of the exhibit.

23 **Exhibit O-Winters 3-H**, which appeared to be a photocopy of a map or aerial
24 photograph. The upper right corner is labeled "T9S, R8E."

25 Objector Winters offered the following exhibits that were not admitted into
26 evidence at the hearing:

27 **Exhibit O-Winters-2-D** is a copy of an unsigned letter dated "13 September
28 2004" from JoAn E. Winters to Scott Compton. I did not admit the exhibit on the
29 grounds that it is irrelevant because it addresses alleged illegal use of water.

30 **Exhibit O-Winters-2-B** is a photocopy of a certified mail receipt. Applicant
31 objected to admission of the exhibit on the grounds that it is immaterial and irrelevant

1 because it deals with alleged illegal use of water. I agreed and the exhibit is not
2 admitted.

3 **Exhibit O-Winters-2-G** is a photocopy of a letter from Scott Compton to U.S.
4 Department of Agriculture – Forest Service dated July 11, 2002. **Exhibit O-Winters-3-**
5 **E** is a copy of the EA prepared for the application that was updated October 14, 2004.
6 These exhibits were not admitted because they are in the Department’s file in this
7 matter and, therefore, are already a part of the record.

8 **Exhibit O-Winters-3-F** is a copy of a warranty deed signed by Clesson M. and
9 Betty C. Hayes on March 6, 1990. **Exhibit O-Winters-3-G** is a copy of a warranty deed
10 signed by Robert W. Munson and notarized on March 1, 1991. Objector JoAn Winters
11 argued that the exhibits are relevant because the conservation easement states that the
12 land should be irrigated to help “them” get water. Applicant objected to both exhibits on
13 the grounds that both exhibits are not relevant. I did not admit these exhibits because
14 they are not relevant. I do not have jurisdiction to enforce a conservation easement and
15 the terms of a conservation easement are not at issue in this contested case.

16 **Exhibit O-Winters-3-I** is an abstract of water right claim dated 9/23/92 for Water
17 Right Number 43B-020813-00, which is the water right proposed to be changed in this
18 application. This exhibit was not admitted because there is adequate and more current
19 documentation of this water right in the record.

20 **Exhibits O-Winters-3-J** and **O-Winters-3-K** appear to be cover sheets for water
21 rights transfer documents for File # 43-B-W-020813-00. These exhibits were not
22 admitted because they are cover sheets and have no probative value. Ownership of the
23 water right is already documented in the record and was not disputed.

24 **Exhibit O-Winters-3-Q** is a photocopy of a map labeled “43B-W-020813-00 –
25 IRRIGATION” in the upper right hand corner. The exhibit was not admitted because it is
26 already in the file. Objector Winters argued that the exhibit should be admitted because
27 the map in the file doesn’t say anything about Gardiner; however, I find that “Gardiner”
28 is clearly labeled on the map in the file and this exhibit has no additional probative
29 value.

1 **Exhibit O-Winters-3-S** is a copy of the field investigation report included in
2 Applicant's Exhibit A-3. This exhibit was not admitted because the document had
3 already been admitted and was part of the record.

4 **Exhibit O-Winters-3-T** appears to be a photocopy of an aerial photograph.
5 Objector Winters argued that the exhibit should be admitted because it shows various
6 ditches. I found that there were no ditches labeled on the photo and I did not admit it
7 because the photo does not show anything that is not in the record.

8 **Exhibit O-Winters-3-U** is the May 1996 draft of portions of the Gardiner Area
9 Comprehensive Plan. Objector Winters argued that the exhibit should be admitted
10 because it mentions how important irrigated land is as a source of food for wildlife.
11 Applicant argued that the effect of the proposed change on elk is not relevant. I agreed
12 and the exhibit was not admitted. The effect of the proposed change on elk is not one
13 of the criteria at issue in this contested case.

14 **Exhibit O-Winters-3-V** is a map labeled "Yellowstone's Northern Winter Range."
15 This exhibit was not admitted because it is irrelevant and redundant. There are better
16 maps in the file showing the existing and proposed place of use.

17 **Exhibit O-Winters-3-X** is a photocopy of a map labeled "Schedule B-1". It was
18 drawn by Gutkoski and the date is illegible. Applicant argued that the exhibit is
19 irrelevant because it relates to a condemnation action that is not at issue in this matter.
20 The exhibit was not admitted because it is not relevant.

21 **Exhibit O-Winters-3-Y** is a photocopy of part of a boundary survey for W.P.
22 Hoppe. The date and much of the plat is not legible. Applicant argued that it should be
23 admitted because it shows a ditch. I could not find the ditch, and all ditches affected by
24 the application are shown on other maps that are in the record. The exhibit was not
25 admitted because it has no probative value.

26 **Exhibit O-Winters-3-Z** is a copy of a letter to the editor of an unidentified
27 publication from Ingrid Statz, James C. Statz, and JoAn Winters. The exhibit was not
28 admitted because it states opinions, some that are relevant in this matter and some that
29 are not. Objector Winters was instructed to include any relevant opinions in her closing
30 argument.

1 **Exhibit O-Winters-3-Z-1** is a photocopy of a Bozeman Chronicle article entitled
2 "USFS considering land swap." Objector Winters testified that the article was not
3 accurate. Applicant argued that it has no relevance in this matter. The exhibit was not
4 admitted because it is not relevant and the party who offered the exhibit stated it was
5 not accurate.

6 **Exhibit O-Winters-3-Z-4** is a photocopy of an order dated December 23, 2003
7 from Judge C. Bruce Loble, Water Court of the State of Montana, Yellowstone Division,
8 In the Matter of the Adjudication of the Existing Rights to the Use of All the Water, Both
9 Surface and Underground, Within the Yellowstone River Above and Including all
10 Tributaries of the Yellowstone River Above and Including Bridger Creek in Gallatin,
11 Park, Sweet Grass and Stillwater Counties, Montana, Case 43B-221; 43B-W-059770-
12 00. Applicant objected to admission of this exhibit on the grounds that the water right is
13 not at issue and the order references a master's report that is not included. The exhibit
14 was not admitted because it has no probative value without the master's report, and is
15 redundant. The general abstract for this water right has already been admitted (see
16 Exhibit O-Winters-3-Z-3).

17 **Exhibit O-Winters-3-Z-6** is a copy of an amendment of claim no. 43B-W-059770
18 filed in the Water Court, Yellowstone Division. Applicant argued that the amendment is
19 not relevant to the change application that is the subject of this case. I agreed.

20 I took under advisement and now rule on Objector Winters' motion to admit the
21 following exhibits:

22 **Exhibit O-Winters-2-F** is a copy of electronic mail correspondence between
23 Scott Compton and JoAn Winters on October 6, 2004 and September 27, 2004.
24 Applicant objected to admission of this exhibit on the grounds that it dealt with alleged
25 illegal use of water and the adequacy of the EA. These topics are not at issue in this
26 contested case. I believed that Objector Winters withdrew her motion to admit the
27 exhibit and did not rule on this matter during the hearing. I now rule that the exhibit is
28 irrelevant and is not admitted.

29 **Exhibit O-Winters-3-A** is an unsigned letter from JoAn Winters to Scott
30 Compton dated September 28, 2004. The exhibit is not admitted because it is irrelevant
31 and does not have probative value. The letter expresses the author's opinion about the

1 adequacy of the EA prepared in this matter as well as whether or not an environmental
2 impact statement should have been prepared. The adequacy of the EA is not at issue
3 in this hearing. Furthermore, the letter states an opinion without supporting facts or
4 reasoning.

5 **Exhibit O-Winters-3-B** is an undated note from JoAn Winters to Scott Compton.
6 The exhibit is not admitted because it does not have probative value.

7 **Exhibit O-Winters-3-D** is a letter from JoAn E. Winters dated November 19,
8 2004 re: Update to "Exhibit O-Winters 3-Jo An Winters' Rewritten Environmental
9 Assessment. The exhibit is not admitted because it is a cover letter that has no
10 probative value and is not relevant.

11 **Exhibit O-Winters-3-R** is a photocopy of a map "Proposed Place of Use. Parcel
12 proposed for conveyance to Hoppe." This exhibit is not admitted because it is already
13 in the Department file and part of the record.

14 **Exhibit O-Winters-3-W** is a photocopy of Final Judgment and Order Disbursing
15 Funds, Civil No. 1544, U.S. District Court, Butte Division dated February 7, 1969.
16 (Parties in the case are not clearly legible.) Objector Winters argued that the exhibit is
17 relevant to the trade of land proposed by the Forest Service. Applicant argued that the
18 trade of land is not relevant. I agree. The exhibit is not admitted.

19 **Exhibit O-Winters-3-Z-2** is a photocopy of a letter to the editor of an unidentified
20 publication from JoAn Winters entitled "Response to Chronicle article." Applicant
21 argued that the exhibit should not be admitted because it presents an opinion which
22 Objector Winters could present in her closing argument. The exhibit is not admitted
23 because it addresses issues that are not relevant in this matter including Objector
24 Winters' opinion on the proposed land trade and Forest Service land management
25 policies. The letter also addresses the criteria at issue; however, Objector Winters was
26 given ample opportunity to present evidence and argument.

27 **Objector Statz**

28 Michael Statz offered a video that can be played on a personal computer.
29 Equipment was not available to display the video so that all parties and witnesses could
30 see it and ask questions or rebut the video. The Hearing Examiner asked Mr. Statz if
31 he could describe the video or ask Mr. Compton to describe the video. Mr. Statz agreed

1 to do this and the video was not admitted. Mr. Statz testified that the video shows water
2 is being wasted in the "Donald Creek" ditch at a point just below DC1 on Exhibit A-1.

3 The Hearing Examiner, having reviewed the record in this matter and being fully
4 advised in the premises, does hereby make the following:

5 **FINDINGS OF FACT**

6 **Application and Environmental Review**

7 1. Application to Change a Water Right No. 43B-30002710, in the name of USA
8 (Dept. of Agriculture – Forest Service) and signed by Rebecca Heath, was filed with the
9 Department on July 10, 2002. (Department file)

10 2. The EA prepared by the Department for this application was reviewed and is
11 included in the record of this proceeding. The EA was updated on October 14, 2004. I
12 received a copy of the updated EA on November 8, 2004. A copy of the updated EA
13 was served on all parties November 12, 2004. (Department file)

14 3. Applicant proposes to change the place of use for a portion of the water claimed
15 under Water Right Claim No. 43B-020813-00. The amount of water proposed to be
16 changed is one cubic foot per second (cfs) from Bear Creek. Applicant applied to
17 remove from irrigation 30 acres in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 14, Township 9 South,
18 Range 8 East, Park County. Applicant proposes to change the place of use for one cfs
19 to 26.7 acres in the E $\frac{1}{2}$ of Section 24, Township 9 South, Range 8 East, Park County.
20 (Application, Department file). The period of diversion, purpose, and initial point of
21 diversion would remain the same.

22 4. I take judicial notice of the fact that a quarter-quarter section in Montana is
23 generally 40 acres.

24 5. **Finding.** The area proposed to be removed from irrigation was modified during
25 the hearing and has not been clearly identified.

26 **Discussion.** A map showing the area initially proposed to be removed from
27 irrigation is included in the Department file. Applicant proposed to modify its application
28 during the hearing as follows: exclude (and continue to irrigate) 5 acres in the northwest
29 corner of the area proposed to be removed from irrigation; and extend the area to the
30 south to encompass a total of 30 irrigated acres (see Finding of Fact No. 3). Although
31 Ken Britton testified that he could identify a total of 30 irrigated acres within the same

land description included in the public notice for this application, he estimated an area of approximately 60 partially irrigated acres would be equivalent to 30 acres of irrigated land, but he was not sure exactly how many acres would be included, and did not identify the specific acres to be removed from irrigation. (Testimony of Ken Britton) Five acres within the area identified in the public notice were excluded from the modified area. Only 35 acres remain in the quarter-quarter section identified. If approximately 60 acres must be removed from irrigation to equal 30 irrigated acres, I am not convinced that these 60 acres fall within the quarter-quarter section identified in the public notice because the Applicant has not shown there are more than 40 acres in this quarter-quarter section. (See Finding of Fact No. 4)

6. In order to get water to the new place of use, Applicant would partially change the means of diversion. The initial point of diversion and means of diversion would not change. Previously water was diverted from Bear Creek at BC1 and conveyed via the Biglow-Chapman ditch. (All points and ditches are shown on the Attachment.) The Biglow-Chapman ditch splits into various forks. The Hayes-McPherson ditch splits from the Biglow-Chapman ditch at BC3. Water was conveyed via the Hayes-McPherson ditch to the existing place of use for this water right in Section 14, Township 9 South, Range 8 East, Park County.

Applicant proposes to use the same initial point of diversion and means of diversion. However, instead of diverting water into the Hayes-McPherson ditch, water would be diverted into the Donald Creek ditch at DC1. Water would be conveyed through this ditch to the proposed place of use to the west of DC2. (Testimony of Cheryl Taylor, Exhibit A-1) (The terms "Hayes-McPherson ditch" and "Donald Creek ditch" are naming conventions used at the hearing to distinguish between branches of the Biglow-Chapman ditch.)

7. I take official notice of the General Abstract for Water Right Claim Number 43B-20813-00 dated December 6, 2004. (This is the water right proposed to be changed by this application.) Parties had an opportunity to review the abstract at hearing and no objection was made.

8. The water right proposed to be changed is a claim for 5 cfs, up to 500 acre-feet per year to divert water from Bear Creek via the Biglow-Chapman ditch for irrigation.

1 The priority date claimed is December 29, 1969. The place of use claimed is 80 acres
2 in the S½ NW¼; 10 acres in the N½ N½ SW¼; 20 acres in the NW¼SE¼; and 30 acres
3 in the SW¼NE¼ of Section 14, Township 9 South, Range 8 East, Park County. The
4 period of diversion claimed is May 1-October 31. (General Abstract for Water Right
5 Number 43B-20813-00 dated December 6, 2004.)

6 **Public Notice**

7 9. A public notice describing the application and procedure for objection to the
8 application was published in the Livingston Enterprise, a newspaper of general
9 circulation published at Livingston on July 16, 2003. The notice was also mailed to
10 persons listed in the Department file. (Department file)

11 10. The public notice describes the past place of use for the water right proposed to
12 be changed as follows: "30 acres in the SWNE, Sec. 14, T9S, R8E, Park Co."

13 11. I find that the application as modified during the hearing is so vague with respect
14 to the description of the acres proposed to be removed from irrigation that I cannot
15 determine whether or not "facts pertinent to the application" have been included in the
16 public notice. Mont. Code Ann. §85-2-307 (See Finding of Fact No. 5).

17 **Supplemental Water Rights**

18 12. Applicant has one other water right for irrigation of the proposed place of use.
19 This is Water Right Claim Number 43B-59770-00. The source is an unnamed tributary
20 of Eagle Creek (Testimony of Cheryl Taylor and Exhibit O-Winters-3-Z-3)

21 **Historic Water Use**

22 13. Applicant has irrigated the general area known as the Hayes-McPherson ranch in
23 Section 14, Township 9 South, Range 8 East, Park County, using water from Bear
24 Creek diverted via the Biglow-Chapman and Hayes-McPherson ditches as recently as
25 1999. (Testimony of David Brunz, Ken Britton, and Ronald Shorter.) Grass hay with
26 some alfalfa mixed in was generally grown in this area. (Testimony of Cheryl Taylor,
27 David Brunz)

28 14. **Finding.** I do not find that the area proposed to be removed from irrigation has
29 been historically irrigated from Bear Creek.

1 **Discussion.** The area proposed to be removed from irrigation has not been
2 clearly identified. (See Finding of Fact No. 5.) I cannot determine that an area has
3 been irrigated without knowing where it is.

4 Furthermore, the Applicant is not certain about the number of acres of land that
5 have been historically irrigated in the quarter-quarter section initially identified. Mr.
6 Britton initially testified that 25 of the 30 acres initially proposed to be removed from
7 irrigation were not irrigable and that he doubted they had seen much irrigation. He later
8 revised his testimony to say that some of the lowlands in this area probably got a little
9 wet from the flood irrigation and estimated that one-half of the area is rock and half of
10 the area is lowland that received water. No records were presented to document the
11 historic irrigation of this area. I am not convinced that the Applicant is certain that there
12 are 30 acres of historically irrigated land in the area proposed to be removed from
13 irrigation.

14 15. The Hayes-McPherson ditch dumps water into Eagle Creek instead of carrying it
15 across Eagle Creek because the flume is not functional. (Testimony of Cheryl Taylor)

16 **Adverse Effect**

17 16. Applicant proposes to grow the same crop in the same climatic area on the new
18 place of use. (Testimony of Cheryl Taylor, Scott Compton)

19 17. **Finding.** The Applicant did not prove that the consumptive use of water will not
20 increase and the use of existing water rights will not be adversely affected if the
21 proposed change is authorized.

22 **Discussion.** If all other factors are constant (See Finding of Fact No. 16),
23 consumptive use of water will increase if the acreage irrigated increases. Without proof
24 that the Applicant will cease irrigation of an area that has historically been irrigated, I
25 cannot conclude that consumptive use of water will not increase. (See Finding of Fact
26 No. 14)

27 I do not know whether the water proposed to be changed has been: consumed
28 through irrigation of an area that will be removed from irrigation; consumed through
29 irrigation of lands that will continue to be irrigated; discharged into Eagle Creek at the
30 flume at HM2; left in Bear Creek or the Biglow-Chapman ditch; or whether the water
31 goes some other place. Regardless of where it goes, water that is not currently

consumed under this water right is available for appropriation and appropriators will be adversely affected if the proposed change is authorized without proof that the consumptive use of water under this right will not be increased.

Adequacy of Appropriation Works

18. I find that the following segments of the ditches proposed to be used to convey water to the place of use are not presently adequate: the segment of the Biglow-Chapman ditch between BC3 and DC1/BC4; and a segment of the Donald Creek ditch below DC1. (Testimony of Cheryl Taylor and Scott Compton, Exhibit A-3)

19. I find that ditch segments referenced in Finding of Fact No. 18 would be adequate after completion of maintenance and rehabilitation work. (Testimony of Scott Compton and Cheryl Taylor)

20. Water diverted from Bear Creek via the Biglow-Chapman ditch at BC1 is not measured. (Testimony of David Brunz)

21. I find no evidence in the record of a measuring device where the Hayes-McPherson ditch splits from the Biglow-Chapman ditch at BC3.

22. There is no measuring device where the Donald Creek ditch splits from the Biglow-Chapman ditch at BC4/DC1. (Exhibit A-3)

23. Measuring devices are needed at the points identified in Findings of Fact Nos. 21 and 22 to ensure that Applicant does not divert more water than claimed or authorized or more water than can be put to beneficial use.

Beneficial Use

24. Applicant proposes to divert up to 96 acre-feet per year for irrigation of a grass crop. Applicant testified this volume of water was calculated using Natural Resources Conservation Service (NRCS) guidelines for a dry year and based on Department calculations but did not identify specific assumptions. (Testimony of Cheryl Taylor).

25. Applicant proposes to divert 3.59 acre-feet for each irrigated acre.¹

26. The amount of water claimed under Water Right Claim No. 43B-020813-00 amounts to a diversion of 3.57 acre-feet for each irrigated acre.² Cheryl Taylor testified

¹ 96 acre-feet /26.7 acres = 3.59 acre-feet per acre.

² 500 acre-feet/30 acres = 3.57 acre-feet per acre.

1 that the amount of water claimed is an appropriate amount to divert based on her
2 analysis of irrigation guidelines.

3 27. Applicant proposes to grow the same crop in the same climatic area on the new
4 place of use. (See Finding of Fact No. 16)

5 28. Ditch loss from the proposed diversion would be less than the loss from the
6 existing diversion. (Testimony of Cheryl Taylor)

7 29. Applicant has not shown why approximately the same amount of water must be
8 diverted to irrigate an acre of land before and after the proposed change if ditch loss
9 from the proposed diversion is less than ditch loss from the existing diversion.

10 30. Applicant has not shown that the amount of water proposed to be used (96 acre-
11 feet) is the minimum amount necessary to accomplish the proposed beneficial use
12 without waste.

13 31. Applicant's proposed use of water for irrigation is a use of water that is beneficial
14 to the appropriator.

15 **Possessory Interest**

16 32. The Applicant has a possessory interest in the proposed place of use.
17 (Testimony of Cheryl Taylor)

18 **Salvaged Water**

19 33. The Applicant did not apply to salvage water. (Department file)

20 **Water Quality**

21 34. No valid objections related to adverse effect on the water quality of an
22 appropriator were received by the Department. (Department file)

23 35. No valid objections related to the ability of a discharge permit holder to satisfy
24 effluent limitations of a permit were received by the Department. (Department file)

25
26 Based upon the foregoing Findings of Fact and upon the record in this matter,
27 the Hearing Examiner makes the following:

28 **CONCLUSIONS OF LAW**

29
30 1. The Department has jurisdiction to approve a change in appropriation right if the
31 appropriator meets the requirements of Mont. Code Ann. § 85-2-402.

2. I cannot conclude that adequate public notice of this application has been given. A public notice containing the facts pertinent to the change application must be published once in a newspaper of general circulation in the area of the source and mailed to certain individuals and entities. (Mont. Code Ann. §§ 85-2-307, 308, and 309) (See Finding of Fact No. 11)

3. The Hearing Examiner may take notice of judicially cognizable or generally recognized technical or scientific facts within the Department's specialized knowledge. Parties shall be notified either before or during the hearing or by reference in the proposal for decision of the material noticed. Parties may contest the materials first noticed in this proposal for decision by filing exceptions to the proposal for decision. (ARM 36.12.221(4); ARM 36.12.229) (See Findings of Fact Nos. 4 and 7.)

4. The Department shall approve a change in appropriation right if the appropriator proves by a preponderance of evidence the applicable criteria in Mont. Code Ann. § 85-2-402.

5. The Applicant has not proven by a preponderance of evidence that the use of existing water rights of other persons or other perfected or planned uses or developments for which a permit or certificate has been issued or for which a state water reservation has been issued will not be adversely affected. (Mont. Code Ann. § 85-2-402(2)(a))

The Applicant did not meet its initial burden to show that historic consumptive use of water will not increase and that the use of existing water rights will not be adversely affected. (See Finding of Fact No. 17.)

A key element of an evaluation of adverse effect to other appropriators is the determination of historic consumptive use of water. Consumptive use of water may not increase when an existing water right is changed. (In The Matter Of Application To Change A Water Right No. 40M-30005660 By J. Harry Taylor II And Jacqueline R. Taylor, Final Order (2005); In the Matter of Application to Change a Water Right No. 40A 30005100 by Berg Ranch Co/Richard Berg, Proposal for Decision (2005) (Final order adopted findings of fact and conclusions of law in proposal for decision); In the Matter of Application to Change a Water Right No. 41I-30002512 by Brewer Land Co, LLC, Proposal for Decision (2003) (Final order adopted findings of fact and conclusions

1 of law in proposal for decision). An appropriation that results in new consumption of
2 water is a new appropriation and must bear the priority date at which the change is
3 made. (Featherman v. Hennessy, 43 Mont 310, 115 P. 983 (1911). The rights of other
4 appropriators are adversely affected if the Applicant, by changing the use, increases the
5 volume of water consumed. In the Matter of Application for Beneficial Water Use Permit
6 No. 14,965-g14E and Application for Change of Appropriation Water Right No. 19, 230-
7 c41E by Thomas H. Boone, Trustee, Final Decision, (1981).

8 Subsequent (junior) appropriators are entitled to have the water flow in the same
9 manner as when they located. Spokane Ranch & Water Co. v. Beatty, 37 Mont. 342, 96
10 P. 727 (1908); In the Matter of Application to Change a Water Right No. 76N 30001166
11 by Thomas and Loreli Mowery, Proposal for Decision (2004) (Final order adopted
12 findings of fact and conclusions of law in proposal for decision).

13 6. The Applicant has proven by a preponderance of evidence that the proposed
14 means of diversion, construction, and operation of the appropriation works are
15 adequate, subject to the following conditions: that no water be diverted until the
16 Applicant has demonstrated that designated segments of the Biglow-Chapman and
17 Donald Creek ditches have been rehabilitated so they can carry all water rights claimed
18 for conveyance through these ditch segments; and that no water be diverted until
19 measuring devices are installed at the locations identified in Findings of Fact Nos. 21
20 and 22. (See Findings of Fact Nos. 18, 19, 21, 22, and 23.) Mont. Code Ann. § 85-2-
21 402(2)(b). In the Matter of the Application for Change of Appropriation Water Right 411-
22 G(W) 001042-00 by Neil W. and Donna Moldenhauer, Proposal for Decision (2001)
23 (Department found that the diversion works and conveyance ditch were not in working
24 condition at the time of the hearing but that they would be rehabilitated and approved
25 the proposed change.)

26 7. The Applicant has not proven by a preponderance of evidence that the quantity
27 of water proposed to be used is the minimum amount necessary for the proposed
28 beneficial use. (See Finding of Fact No. 30.) Diversion of water to anything but a
29 beneficial use is a waste of water that is prohibited by law. Mont. Code Ann. §§ 85-2-
30 102(2)(a), 85-2-102(19), 85-2-114, and 85-2-301. (See Bitterroot River Protective

1 Association v. Siebel, Order on Petition for Judicial Review, Cause No. BDV-2002-519,
2 Montana First Judicial District Court, Lewis and Clark County (2003)

3 8. The Applicant has proven by a preponderance of evidence the proposed use of
4 water is a beneficial use of water. (See Finding of Fact No. 31.) Mont. Code Ann. §§
5 85-2-402(2)(c); 85-2-102(2).

6 9. The Applicant has proven by a preponderance of evidence that the Applicant has
7 a possessory interest in the property where water is to be put to beneficial use. (See
8 Finding of Fact No. 32.) Mont. Code Ann. § 85-2-402(2)(d).

9 10. The application does not involve salvaged water; therefore, the criterion in Mont.
10 Code Ann. § 85-2-402(2)(e) does not apply. (See Finding of Fact No. 33.)

11 11. The criteria in Mont. Code Ann. § 85-2-402(2), subsections (f) and (g) do not
12 apply because no valid objections were received. Mont. Code Ann. § 85-2-402(3). (See
13 Findings of Fact Nos. 34, 35.)

14 12. The Department may not grant an authorization to change a water right unless
15 the Applicant proves all of the applicable Mont. Code Ann. § 85-2-402 criteria by a
16 preponderance of the evidence. Applicant has not proven that all of the applicable
17 criteria have been met. See Conclusions of Law Nos. 5 and 7. Mont. Code Ann. § 85-2-
18 402(2).

19
20 Based upon the foregoing Findings of Fact and Conclusions of Law I make the
21 following:

22 **PROPOSED ORDER**

23
24 Application to Change a Water Right No. 43B-30002710 by USA (Department of
25 Agriculture – Forest Service) is hereby denied.

26 **NOTICE**

27
28 This Proposal for Decision may be adopted as the Department's final decision
29 unless timely exceptions are filed as described below. Any party *adversely affected* by
30 this Proposal for Decision may file exceptions and a supporting brief with the Hearing
31 Examiner. The party may also request an oral argument hearing before the final
32 decision maker. Exceptions, briefs, and requests for oral argument must be filed with

1 the Department or postmarked on or before May 24, 2005. Copies must be mailed to all
2 parties by the same date.

3 Parties may file responses and response briefs to any exception filed by another
4 party. The responses and response briefs must be filed with the Department or
5 postmarked on or before June 13, 2005. Copies must be mailed to all parties by the
6 same date.

7 In order to facilitate efficient scheduling, any party that requests an oral argument
8 is encouraged to provide up-to-date contact information, including email address and
9 facsimile number, if available.

10 The record is closed in this matter and no new evidence will be considered.

11 No final decision shall be made until after the expiration of the above time
12 periods, and due consideration of timely oral argument requests, exceptions,
13 responses, and briefs.

14 Dated this 3rd day of May, 2005.

15
16 
17

18 Mary Vandebosch
19 Hearing Examiner
20 Department of Natural Resources and Conservation
21 Water Resources Division
22 P.O. Box 201601
23 Helena, Montana 59620-1601
24
25

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of Proposal For Decision was served upon all parties listed below on this 3rd day of May 2005 by first class United States mail.

USA (DEPT. OF AGRICULTURE –
FOREST SERVICE)
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